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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	**Hynes v. Qulliq 2013 NUCJ 25**
Date of Judgment (YMD):	20131028
Docket Number:	08-10-290-CVC
Registry:	Iqaluit
Plaintiff:	**Amy Hynes**
	-and-
Defendant:	**Qulliq Energy Corporation**

Before:	The Honourable Mr. Justice E. Johnson
Counsel Plaintiff:	P. Hunt
Counsel Defendant:	R.M. Beamish
Location Heard:	Iqaluit, Nunavut
Date Heard:	June 17-19 2013
Matters:	common law constructive dismissal action

REASONS FOR JUDGMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

[1] The Defendant is a territorial crown corporation under the *Qulliq Energy Corporation Act* R.S.N.W.T. 1988, c. N-2 as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c.28 [*Qulliq*] that has the exclusive right to supply electric power to the communities in Nunavut. It evolved out of the Northwest Territories Power Corporation [NWTPC] when Nunavut was created on April 1, 1999. The *Nunavut Power Utilities Act* S.N.W.T. 1999, c.8, Sch. A, s.1 as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c. 28 [*NPUA*] created the Nunavut Power Corporation that then acquired the Nunavut assets of NWTPC in 2001 under the *Nunavut Power Corporation Utility Assets Transfer Confirmation Act* S. Nu. 2001, c.5. In 2003 the *NPUA* was amended to change the name of the Defendant from Nunavut Energy Corporation to Qulliq Energy Corporation.

[2] Qulliq operates with a Chairperson and Board of Directors of between six and ten persons. The Minister responsible for Qulliq appoints the President of the corporation and may appoint either the President or Chairperson as the chief executive officer.

[3] It has experienced growing pains and has had five Presidents since it separated from the NWTPC and took over responsibilities for electric power production in Nunavut in 2001.

[4] The Plaintiff commenced her employment with the Defendant when the Defendant was in its infancy on February 27, 2003, and rapidly moved up the corporate ladder to become the corporate secretary. It became a position of significant influence because the position was in the head office in Iqaluit and the duties involved coordinating the executive functions of the President and Chairperson of the Board.

[5] Major changes in the Defendant occurred in 2008 and 2009. The current Director of Human Resources and Organizational Development, Catherine Cronin, [Cronin] was appointed on May 26, 2008 and the current President Peter Mackey [Mackey] became President on April 1, 2009. Both were heavily involved in a functional review and job evaluation process that resulted in major changes in the Defendant as set out in a report called "Corporate Functional Review 2009".

[6] As a result of these changes a power struggle developed between Cronin and the Plaintiff that ultimately resulted in the Plaintiff's influence on the executive being significantly diminished.

[7] The Plaintiff worked with the Defendant to create a new role in the Defendant but her efforts were dashed in October, 2009. The inability of the Defendant to accommodate her aspirations in the Defendant had a very negative impact on the Plaintiff and she experienced some health problems.

[8] The Plaintiff tried to negotiate a termination package but the Defendant was not interested in a settlement. On January 21, 2010, the Plaintiff informed the Defendant that she was not returning to work because she had been constructively dismissed.

[9] The Plaintiff commenced this wrongful dismissal action on April 28, 2010 and alleged she was constructively dismissed. The Defendant vigorously defended the action and argues the Plaintiff abandoned her position.

[10] The trial was heard on June 17-19, 2013. The Plaintiff and Sarah Kucera [Kucera] testified for the Plaintiff, and Mackey, Simon Merkosak [Merkosak], and Cronin testified for the Defendant. Judgment was reserved.

II. ISSUES

[11] Was the Plaintiff constructively dismissed or did she abandon her position?

[12] If the Plaintiff was constructively dismissed what were her damages?

[13] Is the Counterclaim meritorious?

A. Was the Plaintiff constructively dismissed or did she abandon her position?

(i) Evidence

A.i.1 Change of Plaintiff's Job Description

[14] The Plaintiff is 36 years old and has a certificate in business administration from Memorial University in Newfoundland. She was 25 years old when she first moved to Iqaluit to look for work. She commenced employment with the Defendant in Iqaluit on February 27, 2003, as a casual employee in the customer service centre.

[15] On June 13, 2003, she accepted the Defendant's offer of full-time employment as a financial analyst and was direct appointed to the position effective April 14, 2003. Around the same time, she also temporarily assumed the responsibilities of the position of housing manager that was located in Baker Lake and continued to do so until that position was filled in September 2006.

[16] On December 5, 2003, the Plaintiff was direct appointed to the indeterminate position of corporate secretary and remained continuously in that position until January 21, 2010.

[17] On May 26, 2008, Cronin was appointed to the position of Director of Human Resources and Organizational Development and worked out of Baker Lake.

[18] In November 2008, on the recommendation of the Auditor General, the previous President Bruce Rigby [Rigby] initiated a functional review of the operations of the corporation. Cronin was assigned the responsibility to supervise a Request for Proposals to hire an outside consultant to carry out the review**.**

[19] Mackey is the current President and CEO and has occupied that position since April, 2009. An administrative assistant supported all the four previous Presidents. Rigby's administrative assistant, Kitty Papatsie [Papatsie], resigned her position and left the corporation at the end of 2008. Her position was vacant when Mackey became President in April, 2009, and the Plaintiff provided all the support required by Rigby until Mackey took over, in addition to her formal duties supporting Merkosak and the committees of the Board.

[20] The plaintiff described her work as including the following duties:

(a) Editing and preparing briefing books for members;
(b) Drafting meeting agenda for the approval of the Chairperson of the Board and the Chief Executive Officer [CEO] for all Board and Board committee meetings;
(c) Carrying out required work for board committees;
(d) Assisting in the preparation and submission of all requests for decision by the Cabinet and Financial Management Board [FMB];
(e) Receiving and distributing records of decision of Cabinet and FMB;
(f) Coordinating liaison with Minister responsible for Defendant about inquiries about the operations of Defendant by public;
(g) Preparing briefing notes for Minister about operations of defendant for sessions of the Legislative Assembly;
(h) Maintaining and updating the debenture book of the Defendant that recorded all the loans of the Defendant;
(i) Having custody of the corporate seal of the Defendant and affixing it to documents as required.

[21] During her employment with the Defendant, the Plaintiff worked for four previous Presidents. Although her formal job description may not have included providing support services to the President, she did in fact assist the former Presidents before Mackey on confidential matters that involved submitting requests for decision to Cabinet and attending to responses to letters from the Minister and other stakeholders. She was also involved in the paperwork for fuel stabilization and rider applications and the preparation of briefing notes for the Minister about current issues involving the corporation. She carried out these duties for many years and did not consider them to be temporary, as was the case with the housing manager position.

[22] The Plaintiff testified that she believed that over half her job functions were removed when the Defendant created the enhanced Executive Assistant to the President. She estimated that the remaining duties would occupy about 30 to 40 percent of her time.

A.i.2 Adding Internal Auditor Position and Corporate Secretary Position

[23] A functional review is a corporate wide audit that looks at how all the different departments function within the organization. It includes looking at job descriptions to see how well they fit together and how the work gets done.

[24] Overlapping the functional review was a job evaluation process that began in 2009 as the result of a grievance filed by the Nunavut Employees Union. The work was carried by a six-person committee reviewing all the job descriptions to evaluate the value of the job in relation to organizational need with equal union and non-union representation. Each job description was assessed using a number of factors that were then assigned points. The points were then used to set the appropriate grade for the position and the right salary level.

[25] Another reason that Papatsie's job was not filled was because the job evaluation and functional review was in progress. As a result of that process a corporate decision had been made to create a new enhanced position called Executive Assistant to the President. The process to fill that position did not start until after Mackey commenced his duties at the beginning of April when the new job was advertised in an online job posting with a closing date of April 24, 2009.

[26] The Plaintiff found out about the posting from a friend sometime between April 6 and April 24, 2009, and became very concerned because she felt the posting described the majority of her job functions on a day-to-day basis. She was particularly concerned that the new position included handling confidential information going to and from to the President and the duty to edit Board papers and briefing notes.

[27] The Plaintiff approached Mackey shortly after she saw the posting and explained her concerns but he assured her that all was well and not to worry about it.

[28] On April 26, 2009, the Plaintiff received an email from Joe Savage [Savage] with an attached position description for her job. He requested her input by April 30. She responded on April 28 that Merkosak's input would be required. She also stated that the job description was incorrect and had been developed by a former President but never implemented. Savage was the Human Resource Leader and reported to Cronin. The Plaintiff continued to be concerned about the security of her job and talked to Merkosak about it. They decided they would discuss it in person at the June board meeting.

[29] The Plaintiff replied to Savage and suggested Merkosak have some input about the position description before she commented on the job description.

[30] The Corporate Functional Review 2009 Report was presented at the Board of Directors meeting in June, 2009. The organization chart presented to the board showed separate positions of Corporate Secretary and Executive Assistant to the President. Over the course of the Board meeting the Plaintiff privately expressed her concerns to a number of directors that the removal of the supporting role for the President would not leave her with enough work to do on a full time basis. At a side meeting that included the Plaintiff; Mackey; corporate legal counsel, Cal Clark [Clark]; Wayne Solomon [Solomon], the chair of the of the audit and finance committees; and Merkosak, by phone, the idea of combining the position of corporate secretary with the unfilled position of internal auditor was discussed.

[31] The Plaintiff was very interested in the internal auditor position, but indicated that she would need some training before she was qualified for the job.

[32] The Plaintiff believed that Mackey, Merkosak, and all the people at the meeting supported the combined position idea and she understood that she would receive some training before she could carry out the internal auditor functions.

[33] Solomon had drafted the previous job description for internal auditor that had been occupied by Andrea Suley [Suley].

[34] At a different meeting Mackey instructed the Plaintiff to work with Solomon on a new position description. She followed up with an email to Solomon on June 19 asking when he would be available to work on a position description combining both positions.

[35] On June 29 Solomon replied that he had communicated with Merkosak and he was very positive about combining both positions. Solomon told her he would draft a position description for her comments and arrange a training program. He concluded with the statement that they could then send it to Mackey so that the Plaintiff could be direct appointed to the position.

[36] The Plaintiff had been direct appointed into both of her positions as a financial analyst and corporate secretary without any competition. Although she was aware that there was a Government of Nunavut policy that required Cabinet approval of a direct appointment she believed it would not be an issue in her case.

[37] On June 30, the Plaintiff contacted Suley and she agreed to provide her with some training information.

A.i.3 The Power Struggle With Cronin

[38] While the Plaintiff was pursuing this new combined job in the corporation with the encouragement of both Merkosak and Mackey, another arm of the corporation spearheaded by Cronin was pursuing a different strategy that was directed at diminishing her influence and plans for a new role in the corporation.

[39] Cronin's cross-examination satisfies me that she was jealous of the Plaintiff's influence on Rigby at the head office in Iqaluit and on Merkosak and the Board of Directors. I do note that the Plaintiff, who is considerably younger than Cronin, had been with the Defendant for many years before Cronin arrived in 2008. The Plaintiff had worked for four Presidents and lived in Iqaluit while Cronin lived away from the action in Baker Lake. Mackey's arrival was an opportunity to enhance her role in the corporation by influencing his decision-making.

[40] It is unclear when Cronin's negative feelings toward the Plaintiff crystallized but the evidence that emerged in her cross-examination points to a telephone complaint from Papatsie on November 17, 2008. Cronin took the details of the complaint over the phone. Papatsie complained that the Plaintiff was harassing her. However, three weeks later Papatsie withdrew the complaint. Cronin immediately telephoned Papatsie to see if she was sure she wanted to withdraw the complaint and confirmed that she did not wish to proceed with it. Rigby was away on vacation and no further action was taken on the complaint. On Rigby's return Cronin included the information about the complaint in a report to Rigby dated January 23, 2009, and did not tell him it had been withdrawn. That report [Exhibit 34] reveals much about Cronin's feelings toward the Plaintiff.

[41] She states:

> It is incumbent on me to meet with you to formally about complaints [that] have been made directly to me with regard to the rude and disrespectful behaviour demonstrated by Amy Hynes. She occupies a position that requires her to be committed to a respectful team philosophy. For the most part, this unfortunately is not happening. The general consensus is that she is abusing the power given to her as the Corporate Secretary.
>
> Amy's relationship with certain Board Members and with Cal Clark blurs professional boundaries and [is] fodder for all kinds of speculation by employees.
>
> Amy was charged with harassment of a fellow co-worker. This is a very serious claim…
>
> Action Required:
>
> We will have a new President chosen in the next few months, and I would hope you meet with her and advise that her behaviour and relationships with all QEC employees must change. I know you have said to me in the past that you agree that she must change, but then nothing is done. This only creates for Amy, a sense of being untouchable. It would be most important that she begins to behave as an inclusive and supportive member of the executive office – especially when we have a new [P]resident onboard.
>
> (Exhibit 34 at paras 1-3, 8)

[42] Rigby took no action against the Plaintiff and she has an unblemished record with the Defendant. Her only performance appraisal took place in 2005 or 2006 and was positive. She never received negative performance feedback and there are no warnings or letters of reprimand on her record.

[43] The competition for the new Executive Assistant to the President continued despite the Plaintiff's concerns and Sarah Glofcheskie, who now uses her maiden name of Kucera, was the successful candidate.

[44] Mackey and Kucera traveled to Baker Lake on July 6 to introduce her to the Human Resource team.

[45] Kucera attended a social gathering at Cronin's residence. Cronin told her that she should not trust the Plaintiff or Clark and that there would be times when she would need to withhold information from them. Kucera testified that Cronin told her she wanted the Plaintiff removed from the corporation. In cross-examination Cronin admitted she made the statements about the Plaintiff and Clark but denied she wanted the Plaintiff terminated. She did admit that she wanted her disciplined. I accept Kucera's version as being accurate. Cronin's words and actions thereafter are consistent with an intention that she wanted the Plaintiff out of the corporation.

[46] In an August 25 email to Kucera, Cronin told her that the Plaintiff's actions about some administrative matters was beyond reasonable. She commented:

> This is actually an edict 'to Peter' that 45 days before a board meeting he must hold a SMC meeting so that each senior manager can provide her with their 'Information or Briefing' notes! Interesting, that she is using the board training… to authentic her authority in working with the board in conducting a ' best practices' performance review on the President! Using what accountabilities from which of the dual areas of leadership in the President/CEO description? My oh my oh my.
>
> Am I to understand that each senior manager is to advise her of their attendance at the 'additional' training? Is this the Governance Training that is supposed to happen the second week in October[?]
>
> I need a glass of wine and some aspirin. (Exhibit 25, page 2)

[47] In cross-examination Cronin interpreted these words as meaning that she thought the Plaintiff was dictating to Kucera not Mackey.

[48] In another August 25 email [Exhibit 26 at para 2] Cronin told Kucera that she had sent an email to Mackey about the Plaintiff's behaviour and lack of professionalism in general. She stated, "I have advised that Peter needs to deal with her insubordination and unrealistic sense of power… now."

[49] In an August 31 email [Exhibit 27 at para 1] Cronin told Kucera, "I have sent a very clear message to Peter with regard to her abuse of board power."

A.i.4 Confusion over the Plaintiff's New Job Description

[50] While Kucera struggled to figure out her role Cronin and Savage were out of the loop about the plans to combine the internal auditor and corporate secretary positions.

[51] On July 26, Savage sent the Plaintiff an email asking her to get back to him as soon as possible about the new position description he had forwarded to her on April 28 that deleted that part of the position description of providing support to the President. The Plaintiff communicated with Solomon and he provided her with a draft position description that combined the corporate secretary and internal auditor positions. She suggested a few changes and they agreed on a final version that was sent for Merkosak's approval on August 10. He suggested one change and there were further changes made before the Plaintiff communicated with Solomon on August 11 with a final version. She told him she had copied Clark and hoped he could facilitate getting it to Human Resources. On August 11 Merkosak suggested to Solomon that he add some duties and Solomon replied on August 12 that he would make the changes and get it to Human Resources.

[52] On August 27, Cronin emailed the Plaintiff and reminded her that she had not received the updated job description and that Mackey wanted the job descriptions finished immediately. The Plaintiff responded that her job description had been revised and sent to Solomon and that she would contact him find out what happened to it. Solomon replied that he thought Clark was going to get it to Cronin and apologized for the mix-up.

[53] On August 31, Solomon told the Plaintiff that he would forward the final job description to Cronin after she had a final review.

A.i.5 Escalation of Power Struggle

[54] Cronin received the new combined job description on September 1, and sent an email to Kucera advising her:

> Just an FYI as I believe you should know how she has constructed her job description. She has added Internal Auditor to her old job description. This came to me today from a Board Member[.]
>
> (Exhibit 28 at para 1)

[55] On September 7, Cronin emailed Kucera complaining about the Plaintiff's work habits.

> Her laissez-faire attitude toward her working hours is another issue that needs to be controlled, especially when she has to work 'overtime' because she hasn't gotten her work done during regular hours. Once Peter is back he can set up an executive office monitoring system, where everyone needs to report in[s] and out[s] as both a common courtesy and to ensure callers [and] visitors can be provided with the right information as to the return of individuals. (Exhibit 29 at para 1)

[56] On September 8, the Plaintiff sent Mackey her new job description. On the same date Cronin wrote to Solomon and informed him that the competencies for the position had not been filled in and asked that they be completed. The following day, the Plaintiff wrote Solomon and asked him how he wanted to handle the problem presented by Cronin because she knew she did not have qualifications for the internal auditor job without some training.

[57] On September 9, Kucera emailed Mackey and forwarded an email she had received from Cronin. She complained about the games Cronin was playing and how it was creating additional stress in doing her work. Cronin asked her to keep quiet about the new Chief Financial Officer Bob Popisil's (phone) visit to Iqaluit:

> Could I please ask you not to include any of my emails with information regarding my conversation with individuals or plans with managers to Amy. I don't want her knowing what I am doing unless I actually send her the information myself. Knowing that Peter is pick[ing] up Bob and that Bob will be in town will create a major interest in him by Cal and Amy who will want to invite him for dinner or lunch. Etc. This week has been especially designed for Peter, Kellend, Darryl and Tim to build a very strong relationship with Bob. Them now being privy to his presence in Iqaluit, could potentially create an opportunity for Cal or Amy to intrude. Hopefully you will understand.
>
> (Exhibit 32 at para 3)

[58] At a Board of Directors meeting on September 21 the Finance and Internal Audit Committee [Committee] reported on the history of the internal auditor position that had been held by Suley. The Committee minutes record that the Committee recommended the position of corporate secretary and internal auditor would be combined. Subsection 6.2 of the *Minutes of Meeting* state, "Training will be provided to transition into the role.[1]" Since the Plaintiff needed training for the internal auditor position I am satisfied that the Committee was essentially recommending that the Plaintiff be appointed to the new position despite her lack of skills for the job.

[59] On October 11, Merkosak emailed the Plaintiff and discussed a number of issues. He informed her she would now be reporting to Mackey to facilitate the administrative requirements.

> I believe [an] organizational chart was approved at the June 09 Board meeting. Further to that org, for administrative purposes (day to day activities) Peter will now be your supervisor. This arrangement is to facilitate the administrative requirements. With me not being here to act as your supervisor is a challenge and not adequate. As far as Board functions, planning, etc. are concern[ed], our working relationship has not changed.
>
> (*Joint Book of Documents*, vol 2, tab 21 at para 5)

[60] The Plaintiff responded that she had spoken with Mackey and had no problem reporting to him. She indicated she would inform Clark about the change.

[61] On October 7, the Plaintiff forwarded her new position description to Mackey. She noted

> I have included a line stating that I report to you for daily supervision – this is not really a change as this is the way it always was and should be.
>
> Due to the number of reporting positions the past president had, this was changed to legal counsel, therefore I have been reporting to him on a daily basis for the past three years. I take no issue with reporting to either position, as long as it is clarified.

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[1] *Joint Book of Documents* vol 2, tab 19.

(*Joint Book of Documents*, vol 2, tab 20 at paras 2-3)

[62] On October 13, the Plaintiff emailed Solomon and inquired about the status of the training in Ottawa she had proposed the week before.

A.i.6 The Plaintiff Loses the Power Struggle

[63] On October 18 Solomon emailed the Plaintiff and informed her that he understood she had learned about the Board's decision not to fill the internal auditor position in the immediate future. He stated:

> That all being said, I would encourage you to discuss with HR your career development needs towards this position. I also understand that Simon is open to you taking the planned courses in Ottawa during the next couple of weeks towards this goal.
>
> (*Joint Book of Documents*, vol 2, tab 25 at para 2)

A.i.7 Plaintiff's Response

[64] The Plaintiff found out about the Board's reversal from Mackey some time before October 18. She had no prior indication that she would not be direct appointed into the new combined position. She described her reaction to the news as follows:

> I was devastated. I spent the last five or six months working on the job description for a position I thought was going to be mine. It was just, it was really hard to hear that it wouldn't be I didn't really understand why.
>
> (*Transcript of Proceedings*, 17 June 2013, p 85 at lines 17-21)

[65] She described her feelings as follows:

> I felt like I didn't have a job any more. I felt I was completely isolated in the company, and there are things that I love to do were gone. I was left with minimal, very little to do and I just felt like it would only be a matter of time that I would probably lose those too.
>
> (*Transcript of Proceedings*, 17 June 2013, p 106 at lines 8-13)

[66] The Plaintiff responded to the bad news with a letter to Mackey dated October 19. It stated:

> I feel that it is necessary to record the fact that I have not consented to, nor do I accept by choice, the changes to my role and functions, or the fact that I am now expected to apply for a modified job that substantially encompasses my current duties.
>
> I greatly value my position at Qulliq Energy Corporation, and I intend to continue performing duties that are assigned to me with the same dedication and professional commitment that I have always demonstrated to date.
>
> I will be attending the training with the Institute for Internal Auditors and applying for the combined Corporate Secretary/ Internal Audit position, but do want it to be understood that in doing so, I should not be taken as having acquiesced to the changes or to have condoned them.
>
> (*Joint Book of Documents*, vol 2, tab 26)

[67] The Plaintiff was unsure about what would happen to her. She attended the courses in Ottawa and was granted some special leave that kept her away from Iqaluit until November 16. She sold her vehicle and was at work until mid-December when she left for the Christmas holidays and visited Newfoundland.

[68] On December 8 legal counsel for the Plaintiff wrote the Defendant and informed it that he had advised the Plaintiff that she was in a position to pursue a claim for constructive dismissal. He advised that she was prepared to enter into negotiations for an appropriate termination package. He also advised that the Plaintiff was prepared to assist the Defendant by remaining in her position and continuing to fulfill her overall responsibilities for as long as negotiations continue and appear to be making progress. However, her actions were not be interpreted as waiving the legal consequences of the changes or to have condoned them. A response was requested within 10 days but none was received.

[69] On December 16 the Plaintiff sought medical care for high blood pressure and was told to remain off work until January 15, 2010.

[70] During the Christmas break she also sold a house she owned in Ottawa and received the proceeds in March, 2010. At the same time she purchased a house in Gatineau, Quebec.

[71] The Plaintiff moved out of her corporate housing unit on January 11 and moved in with a friend. She also obtained a new medicate certificate authorizing her to stay off work until January 31 because of stress and anxiety.

[72] By email dated January 19, Clark told the Plaintiff that her email access to the Defendant was suspended because of her apparent relocation to Ottawa.

[73] The Plaintiff replied to Mackey on January 21 and told him the Defendant had no right to presume her permanent relocation to Ottawa. Since her email had been cutoff she now considered herself as being constructively dismissed and the Plaintiff never returned to work.

[74] The internal auditor position was not filled until 2.5 years after the Plaintiff's departure.

(ii) Argument

A.ii.1 Plaintiff

[75] The Plaintiff was faced with a fundamental change in her employment duties when the new position of executive assistant to the President position was created and filled on July 1, 2009. Instead of immediately seeking legal advice she chose to work with the Defendant to see if there was an alternative to leaving her employment. In good faith and with Merkosak's and Mackey's encouragement she diligently and vigorously worked with Solomon on a new position description that took most of the summer to finalize.

[76] On September 21, the Board's Finance and Internal Audit Committee recommended that her position be combined with the internal auditor position so that she could be direct appointed to the job as she had been for two previous positions. It appeared that the major change in her job had been resolved and she was happily looking forward to taking the training she had organized in Ottawa.

[77] However, the Defendant changed its position when it informed her in an email on October 18, that the position of internal auditor was not going to be filled in the immediate future and she would have to compete for the job. It justified its actions by falling back on corporate or government policies on direct appointments that had not been a problem for her in the past or for other employees where the Defendant was motivated to find a solution.

[78] The Plaintiff was devastated by the change of heart of the Defendant and took steps to protect herself by reserving her rights and selling her car and some furniture. She retained counsel and offered to negotiate but got no response from the Defendant leading to the final breach in the relationship when her email access was cut off.

[79] The Plaintiff relies on *Schumacher v Toronto-Dominion Bank* [1999] OJ No 1772, 44 CCEL (2d) 48 [*Schumacher*] that applied *Farber v Royal Trust Co.* [1997] 1 SCR 846, [1996] SCJ No 118 [*Farber*], to argue that the plaintiff was not required to remain in her position even though the Defendant was prepared to continue to pay her salary. A demotion with a loss in prestige and status can be a substantial change to the essential terms of an employment contract that warrants a finding that an employee was constructively dismissed.

[80] The Plaintiff's powerful subjective recognition was that her position was not just threatened but that it was gone as she knew it. Considering all the facts in this case the Plaintiff was constructively dismissed.

A.ii.2 Defendant

[81] The Defendant accepts the authority of *Schumacher* and *Farber* but submitted the following cases to demonstrate that a court's conclusion on the constructive dismissal issue is essentially a fact- driven exercise. However, in most of these cases the court found the changes were not substantial and that the employee was not constructively dismissed.

(a) *Burns v Sobeys Inc.* 2007 NSSC 363, [2007] NSJ No 509, (17 year employee offered other positions because employer accepted there was major change but employee refused jobs. Court found Plaintiff constructively dismissed);
(b) *Calder* v *Island Medical Laboratories Ltd.* [1994] BCJ No 571, [1994] BCWLD 1020, (Employer hired consultant to review training procedure in office. Some training of non-technical staff removed from 21 year Plaintiff. Court found the change was a lateral transfer rather a demotion and was not a constructive dismissal);
(c) *Chartrand v R.W. Travel Limited* 2011 ONSC 2148, [2011] OJ No 6420, (20 year Plaintiff off on stress leave. On return dispute over working conditions and Plaintiff resigned. Court found Plaintiff not constructively dismissed);
(d) *Holowachuk v Pine Industries Ltd.* 2012 SKQB 497, [2012] S.J. No. 743, (32 year employee resigned alleging constructive dismissal. Court found changes not substantial and employee not justified in refusing to accept continued employment);
(e) *McMillan v Selectrucks of Toronto Inc.* 2011 ONSC 6128, [2011] OJ No 4602, (3 year employee resigned and claimed constructive dismissal because of alleged mistreatment. Court found plaintiff voluntarily resigned and not constructively dismissed);
(f) *Trueman v City of Abbotsford* 2006 BCSC 1820, [2006] B.C.J. No. 3173, (11 year employee had some changes in his job description because of amalgamation. Court found the changes not substantial and no constructive dismissal);
(g) *Zalusky v Nestle Canada Inc*. [1992] BCJ No 2921, 6 CCEL (2d) 73 (11 year employee had changes to job because of re-organization. Court found the changes not substantial and Plaintiff not wrongfully dismissed).

[82] The Defendant argued that this case law clearly establishes that an employer has the right to exercise business judgment and make changes it feels are necessary for the corporation to reach its objectives. It admits that the changes made when the new executive assistant position was created resulted to the Plaintiff's job being affected. However, it argues that the changes were not substantial and did not amount to a fundamental breach of the employment contract.

[83] If there was a fundamental change in the duties the Defendant argues that the Plaintiff failed to mitigate her damages by staying in her job and working with the Defendant so that she could fill the internal auditor position in the future. The Defendant acted in good faith and supported her attendance at the courses in Ottawa as the first step in qualifying her for the position.

[84] The Defendant argues the Plaintiff did not really want to work with it to find some other job within the corporation because she immediately took steps to leave Iqaluit. These actions demonstrate that what she wanted was a severance package from the Defendant. She was looking for an excuse to quit and found it when her email was cut off.

(iii) Analysis

[85] Constructive dismissal was defined by Gonthier J. in *Farber* at paragraph 33 as follows:

> In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. The leading case on this question is an English decision, In *re Rubel Bronze and Metal Co. and Vos,* [1918] 1 K.B. 315, in which the following was stated at pp. 321-22:

> But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of master and servant. ... It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract". ... The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation. ... But ... a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain. ...

Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice. (See, for example, *Stewart v. MacMillan Bloedel Ltd.* (1992), 42 C.C.E.L. 225 (B.C.C.A.), aff'g (1991), 37 C.C.E.L. 292 (B.C.S.C.); *Cox v. Royal Trust Corp. of Canada* (1989), 26 C.C.E.L. 203 (Ont. C.A.), leave to appeal refused, [1989] S.C.C.A. No. 283, [1989] 2 S.C.R. x*; Mifsud v. MacMillan Bathurst Inc.* (1987), 60 O.R. (2d) 58 (H.C.); *Schwann v. Husky Oil Operations Ltd.* (1989), 27 C.C.E.L. 103 (Sask. C.A.); *Saint John Shipbuilding Ltd. v. Snyders* (1989), 29 C.C.E.L. 26 (N.B.C.A.); *Farquhar v. Butler Bros. Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89 (C.A.); *Baker v. Burns Foods Ltd.* (1977), 74 D.L.R. (3d) 762 (Man. C.A.). See also *Cayen v. Woodwards Stores Ltd.*(1993), 45 C.C.E.L. 264 (B.C.C.A.); *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349 (C.A.); *Orth v. MacDonald Dettwiler & Assoc. Ltd.*(1986), 8 B.C.L.R. (2d) 1 (C.A.); *Reber v. Lloyds Bank International Canada* (1985), 61 B.C.L.R. 361 (C.A.); although it was found in these cases that there had been no constructive dismissal.)

[86] It is clear from *Farber* at para 26 that the test is objective.

> To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

[87] The Defendant attempted to establish in cross-examination that the Plaintiff was overstating the extent to which her duties changed. Cronin testified that there was only a slight change where the secretarial duties that the Plaintiff had been performing from the time of Papatsie's departure were transferred to the position of executive secretary.

[88] Unfortunately, there is no position description for her job as corporate secretary. I am satisfied that the Plaintiff was a credible witness and accept her evidence about her job duties as noted above. In exhibit 21 Mackey acknowledged the historical role that the Plaintiff filled. It was a role beyond the administrative duties fulfilled by Papatsie. Mackey's email was in response to an email from the Plaintiff complaining that she was being excluded from Senior Management Meetings and management training. He acknowledged his executive assistant was now fulfilling some of the functions that the Plaintiff had been performing.

[89] The Defendant argues that the Plaintiff only took on the additional duties of assisting the President on a temporary basis when Papatsie departed in late 2008. When Mackey took over in April the Defendant followed through with the job evaluation process and created a new job description for the former administrative assistant. On April 28 Savage asked for her comments on the new position. When the Plaintiff did not respond the Defendant went ahead and appointed Kucera to the new position and the duties that the Plaintiff had temporarily assumed went back to Kucera.

[90] I find that the plaintiff did not temporarily take over Papatsie's job. She had been carrying on a much larger role than Papatsie and continued to so until those duties were removed and transferred to Kucera in the new executive assistant position.

[91] I am satisfied that the creation of the new position of executive assistant to the President removed many of the key duties of the Plaintiff. A reasonable person in the same position as the Plaintiff would have felt that the essential terms of the employment contract had been substantially changed. The Defendant recognized the substantial change when the President and Chairman authorized Solomon to work with the Plaintiff to create the new position of corporate secretary/internal auditor. She reasonably believed that she would be direct appointed to the new position as had occurred in her two previous positions. That did not occur because the Plaintiff lost the power struggle with Cronin who did not want her working in the head office of the Defendant. The Defendant then discovered disingenuous and technical reasons why the direct appointment could not occur to justify its actions. It is significant that the internal auditor position was not filled until three years after the Plaintiff's departure.

[92] The Defendant's last minute decision not to appoint the Plaintiff to the internal auditor position had a significant emotional impact on her. As she testified, her job as she knew it was gone. She felt completely isolated in the company and the work she loved doing was gone. She was left with minimal work to do and felt it was just a matter of time before that work was gone too. She had been optimistic that the new position of internal auditor would fill the void left by the loss of her former duties but was dashed when the Defendant put up new last minute roadblocks to that position.

[93] It would be have been extremely difficult and unrealistic to expect her to continue in the employ of the Defendant given the actions of senior management to that point. The British Columbia Court of Appeal considered this issue in *Piron v Dominion Masonry Ltd.* 2013 BCCA 184, [2013] BCJ No 801[*Piron*]. The Court held the trial judge correctly applied the objective test set out in *Evans v Teamsters Local Union No. 31* 2008 SCC 20, [2008] 1 SCR No 661 [*Evans*]. In paragraph 30 of *Evans*, Bastarache J. recognized that the subjective evidence of the Plaintiff had to be taken into account in applying the objective test of whether a reasonable person in the plaintiff's position would have accepted the employer's offer:

> …Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701 (Ont. CA), at p. 710). In *Cox*[2], the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*[3], at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation -- including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements -- be included in the evaluation.

[94] Although the Plaintiff may not have been aware of Cronin's feelings about her, I now know with the benefit of hindsight that Cronin was hostile to the Plaintiff and wanted her terminated. I am satisfied that the Plaintiff's dignity and sense of self-worth was seriously affected. She had played a significant role in the corporation for many years and her role was seriously diminished by the change in her duties. A reasonable person in her position would not have continued in her diminished position with the vague chance that she might be appointed to the internal auditor in the future.

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[2] *Cox v Robertson*, 1999 BCCA 640, 181 DLR (4th) 214
[3] *Faquhar v Butler Brothers Supplies Ltd*, [1988] 3 WWR 347, 23 BCLR (2d) 89

[95] The Plaintiff's actions after she found out about the Defendant's last minute change of heart are not relevant. As held in *Piron,* the relevant time for the constructive dismissal analysis is at the time of the substantial change, not what happened after the lawyers became involved. The substantial change was effective when Kucera was appointed to the new position. The Plaintiff did not respond to the Defendant's actions because she thought the Defendant was working with her to find a solution to its' fundamental breach. It was only when the tentative plan was scuttled by the Defendant that she then took reasonable steps to protect her position.

[96] The proper and reasonable response to the Plaintiff's offer to negotiate was for the Defendant to attempt to finalize a severance package. Instead the employer refused to negotiate and the Plaintiff went to the media. From that point forward the gloves were off and the Defendant began an aggressive defence that included an application for security for costs and a frivolous counterclaim that I will discuss later.

[97] It follows that I find that the Plaintiff was constructively dismissed on January 21, 2010.

B. If the Plaintiff was constructively dismissed what were her damages?

(i) Length of Reasonable Notice

[98] The Plaintiff testified that she obtained new employment with the Canadian Nurses Association on July 12, 2010. The salary in her new job salary was significantly less than her salary with the Defendant. Counsel for the Plaintiff filed a document entitled "Summary of Compensation Loss and Mitigation Earnings" that was accepted as part of the Plaintiff's submissions rather than a formal exhibit. It is a month-by-month statement of the Plaintiff's loss of income after deducting the replacement income that started in July. As a result of Cronin's testimony he amended that document in oral submissions to take into account the value of the benefits that the Plaintiff lost. As a result I was asked to add 500$ to the first month and $1500 to each month thereafter to make the final calculation and then to multiply by the number of months I awarded for the wrongful dismissal. The Defendant did not challenge those numbers.

[99] In *Bardal v Globe & Mail Ltd* [1960] OJ No 149, 24 DLR (2d) 140 at para 21 [*Bardal*], McRuer C.J.H.C. made the classic statement on the measure of damages for a wrongful dismissal that:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[100] As noted in *Minott v O' Shanter Development Company Ltd.* [1999] OJ No 5 at para 62, 168 DLR (4th) 270 [*Minott*] the application of *Bardal* requires a court to determine a range of notice periods that may legitimately be characterized as reasonable.

> This submission must be judged against the standard of appellate review of wrongful dismissal awards. Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no one "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact.[4] If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle.

[101] In *Stone v SDS Kerr Beavers Dental, A Division of Sybron Canada Ltd.* [2006] OJ No 2532, [2006] OTC 558 at paras 157-158, Aitken J. held that the list of factors is not exhaustive and a court should not use a starting point or rule of thumb subject to adjustments.

> This list of factors is not exhaustive. (See *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491; *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1[*Wallace*]; *Minott, supra*. Other factors may have to be considered when appropriate.
>
> In assessing damages for wrongful dismissal, the Court should not apply as a starting point any general principle or rule of thumb that an employee is entitled to one month's notice for every year worked, subject to adjustments upwards or downwards. Instead, the Court should undertake a careful weighing and blending of all relevant factors before arriving at a notice period. (See *Minott, supra* at 346).

[102] The Plaintiff relies on *Ashton v Pearle Systems Ltd*. [1994] OJ No 530, 2 CCEL (2d) 243 where Sheppard J. found that 15 months was reasonable notice for an electronic engineer who moved from the United Kingdom to Canada to work. He was employed for four years before he was constructively dismissed and had to return the United Kingdom where he did not find new employment until August 1993.

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[4] *Isaacs v MHG International Ltd* (1984) 45 OR (2d) 693 (ONCA)

[103] The Defendant submits that the maximum notice period should be four months.

[104] The Plaintiff testified that her confidence and self-esteem were low after she left Iqaluit. She required some medical assistance for high blood pressure and stress. It took her a few months to gather her thoughts, analyze what had happened and to start moving forward. She started looking for work in March through an employment agency and found new employment with the Canadian Nurses Association on July 12, 2010. She was paid $13.00 per hour for a 37.5-hour workweek. The position became permanent on November 15, 2010, and her salary increased to $3,833.33 per month and then to $3,952.50 per month on April 1, 2011. She later found employment with the Royal College of Physicians and Surgeons of Canada and has been with that organization for the past couple of years.

[105] She was employed with the Defendant for 7 years and was well established in Iqaluit. She had many friends and was very involved in the community. She hoped to eventually buy a house and planned to stay in Iqaluit for a long time.

[106] Taking into account her age, length of service, level of responsibility, and her success in finding new employment I am satisfied that 14 months is a reasonable notice period.

C. Is the Counterclaim meritorious?

(i) Arguments

[107] Relying on *Wallace*; *Keays v Honda Canada Inc.* 2008 SCC 39, [2008] 2 SCR 362; *August Contracting Ltd. v 1298781 Ontario Inc.* 2011 ONSC 4055, [2011] OJ No 3016; and *MacDonald v ADGA Systems International Ltd.*, 24 September 1997, Brockenshire J., 86263/94 (Ont. SCJ), the Plaintiff argues that the reasonable notice period in this case should be increased because the Defendant carried on an unmeritorious counterclaim.

[108] The Plaintiff applied for and was granted an order compelling the Defendant to provide particulars of the counter-claim. The Defendant produced a document entitled “Lawsuit - Associated Financial Damages to QEC” that was marked as Exhibit 35 and other documentation. The total amount claimed is $759,910.

[109] Toward the end of Cronin’s cross-examination counsel for the Plaintiff tried to question her about exhibit 35. Counsel for the Defendant interjected and stated that he told counsel for the Plaintiff at the outset of the litigation that the Defendant was not pursuing the counterclaim by way of liquidated damages.

[110] In cross-examination Cronin agreed the Defendant never filled the corporate secretary position left vacant by the Plaintiff’s departure and that the internal auditor was not filled for 2.5 years. As a result the Defendant saved the money from both positions over a three-year period.

[111] At the close of the cross-examination counsel for the Plaintiff stated that when he received exhibit 35 on July 3, 2012, he always understood that the Defendant was pursuing the counterclaim and that the Plaintiff had to defend it.

[112] Counsel for the Defendant responded and stated that the Defendant was not pursuing the counterclaim.

(ii) Analysis

[113] The counterclaim was entirely without merit and is dismissed. If the Defendant was not pursuing the counterclaim it should have been discontinued before the trial. It was clearly another tactic in an aggressive defence.

[114] I am satisfied that the Plaintiff has incurred additional costs in defending the counterclaim. However, the issue should be dealt with at a later date when counsel address the issue of costs and pre-judgment interest rather than adding to the notice period damages.

III. CONCLUSION

[115] The cumulative 14-month figure calculated in the Plaintiff's summary is $113,812.61. Adding $500 for the first month and $1,500 for the remaining 13 months adds an additional $20,000 to the cumulative figure and the Plaintiff is awarded damages of $133,812.61. The Plaintiff is also awarded costs and pre-judgment interest that may be spoken to at a future date convenient to counsel and the court or in the alternative counsel may file written submissions.

[116] In closing I bring to counsel's attention my judgment in *Nunavut Teachers' Assn. v Nunavut,* 2010 NUCJ 13, 191 ACWS (3d) 1281, concerning the inadequacy of the party-party tariff in the Rules of Court.

Dated at the City of Iqaluit this 28th day of October, 2013

_____

Justice E. Johnson
Nunavut Court of Justice